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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DE'MARIAN A. CLEMONS,

Plaintiff,

vs.

BRIAN WILLIAMS, *et. al.*,

Defendants.

Case No.: 2:13-cv-93-RFB-NJK

**PLAINTIFF'S UNOPPOSED MOTION
FOR AN ORDER TO MAKE PLAINTIFF
AVAILABLE FOR A MEDICAL
EXAMINATION, X-RAYS, AND A MRI**

Pursuant to Federal Rule of Civil Procedure 26, Plaintiff De'Marian A. Clemons hereby moves for an order compelling Defendants to make Plaintiff available for a medical examination by Plaintiff's own medical expert, an x-ray, and an MRI. This motion is based on the papers and pleadings on file, the attached memorandum of points and authorities, and the record in this case.

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MEMORANDUM OF POINTS AND AUTHORITIES

Litigants in federal court may pursue discovery of “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1). The Federal Rules also expressly permit expert testimony. *See* Fed. R. Civ. P. 26(a)(2). Indeed, “[i]t is beyond cavil that a plaintiff may retain his own expert medical witness to examine himself and render opinion testimony at trial.” *Silverstein v. Fed. Bureau of Prisons*, No. 07-02471, 2009 WL 1451684, at *4 (D. Colo. May 20, 2009).

Ordinarily a district court has no reason to intervene in a plaintiff’s pursuit of expert testimony from his own expert. But here, because Mr. Clemons is incarcerated, he cannot leave Defendants’ custody for appointments with a medical expert or medical testing. As a result, Mr. Clemons cannot by his expert or obtain the x-ray or MRI imagining necessary to assess the extent of his medical injuries without a Court order instructing the prison to take Mr. Clemons to get MRI and X-ray imaging.

District courts often grant requests for orders compelling correctional defendants to make inmate plaintiffs available for evaluations by the plaintiff’s medical experts. *See, e.g., De’lonta v. Clarke*, No. 11-00257, 2013 WL 4584684, at *2 (W.D. Va. Aug. 28, 2013); *Silverstein v. Fed. Bureau of Prisons*, No. 07-02471, 2009 WL 1451684, at *4 (D. Colo. May 20, 2009); *see also, Phillips v. Tangilag*, No. 5:16-CV-00088-TBR, 2019 WL 2862803, at *7 (W.D. Ky. July 2, 2019) (permitting the plaintiff to move to “compel transportation to an outside physician”). Defendants have sometimes contended that a plaintiff must show good cause to obtain such an order, citing Rule 35, but that rule is not applicable. *See, e.g., Silverstein*, 2009 WL 1451684 at *4. At most, courts have asked the plaintiff to show that a doctor has agreed to serve as an expert witness and that an examination is necessary for the doctor’s opinion. *See Phillips*, 2019 WL 2862803 at *7.

Consistent with that body of caselaw, this Court should order the Defendants to: (1) provide Mr. Clemons with X-rays of the Foot (AP, Lateral, and Oblique views), Ankle (AP, Lateral, and Mortise views), and Tibia (AP and Lateral); (2) provide Mr. Clemons with an MRI of the ankle; and (3) make Mr. Clemons available for an in person medical examination at the prison. First, Mr. Clemons’s requested expert discovery is relevant and proportional to the needs of the case.

1 Mr. Clemons alleges, among other things, that the Defendants denied appropriate medical care for
2 injuries to his leg while incarcerated in the Southern Desert Correctional Center. *See, e.g.*, First
3 Amended Complaint (FAC) ¶¶ 1, 10, ECF No. 242. He further alleges that they housed him in
4 conditions that were not appropriate for his injuries. For example, they assigned him to an upper
5 bunk despite being in crutches and could not climb in and out of bed without jumping, which was
6 painful and exacerbated his injuries. *See, e.g., id.* ¶ 24–26. The Defendants have argued previously
7 that they provided adequate treatment and appropriate housing, demonstrating that the extent of
8 Mr. Clemons’ injuries, the appropriate treatment of those injuries, and the adequacy of his housing
9 are disputed and at the center of the case. And each of these topics is appropriately addressed by
10 expert medical testimony.

11 Second, Mr. Clemons’ request is justified. He intends to offer testimony by an orthopedic
12 specialist at trial, Dr. Ian S. Elliott. Dr. Elliott has determined that an examination, x-rays, and an
13 MRI are necessary to form opinions relating to Mr. Clemons’ injuries, appropriate care, and
14 reasonable housing conditions. *See* Ex. A, Elliott Decl. ¶¶ 5-6.

15 Mr. Clemons therefore requests an order compelling Defendants to: (1) provide Mr. Clemons
16 with X-rays of the Foot (AP, Lateral, and Oblique views), Ankle (AP, Lateral, and Mortise views),
17 and Tibia (AP and Lateral); (2) provide Mr. Clemons with an MRI of the ankle; and (3) make
18 Mr. Clemons available for an in person medical examination at the prison. The Defendants do not
19 oppose this motion.

20 DATED this 24th day of October 2019.

21 Respectfully submitted,

22 **GREENBERG TRAURIG LLP**

23 */s/ Jason Hicks*

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ORDER

THE COURT HEREBY ORDERS the Nevada Department of Corrections to (1) provide Mr. Clemons with X-rays of the Foot (AP, Lateral, and Oblique views), Ankle (AP, Lateral, and Mortise views), and Tibia (AP and Lateral); (2) provide Mr. Clemons with an MRI of the ankle; and (3) make Mr. Clemons available for an in-person medical examination by Dr. Ian S. Elliott, M.D. at the prison. **THE COURT FURTHER ORDERS** that the X-rays, and MRI must take place no later than December 1, 2019.

Dated this 25 day of October 2019.



UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that a copy of the foregoing **UNOPPOSED MOTION FOR AN ORDER TO MAKE PLAINTIFF AVAILABLE FOR A MEDICAL EXAMINATION** was filed electronically via the Court's CM/ECF system and served to all parties of record on this date.

DATED this 24th day of October 2019.

/s/ Evelyn Escobar-Gaddi
An employee of GREENBERG TRAURIG, LLP